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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,

Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit.

HERMAN A. BACHRACK,
Haas Building, Los Angeles, California,
Attorney for Petitioner.

CLIFTON HILDEBRAND,
Bank of America Building, Oakland, California,
LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
Russ Building, San Francisco, California,
Of Counsel.

Subject Index

	Page
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement of the Case	3
Specification of Errors to be Urged	4
Reasons Why Writ Should be Granted	4
I. The Circuit Court of Appeals decided an important question of local law, in conflict with applicable local California state court decisions	4
II. The decision below conflicts with decisions of other Circuit Courts of Appeals	6
Conclusion	7

Table of Authorities Cited

Cases

	Pages
Anderson v. C. & O., 252 Ill. 561, 186 N. E. 185, 290 U. S. 675	7
Ballard v. Sacramento Northern Railroad, 126 Cal. App. 486	4, 5
Burns Mtg. Co. v. Fried, 292 U. S. 487	5
Director General v. Ronald, 265 Fed. 138 (C. C. A. Second)	6
Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1	7
Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300	7
Gilvary v. Cuyahoga Valley Railroad, 292 U. S. 57	5
Kenna v. Calumet H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3	7
Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847	7
McMahon v. Montour R. Co., 270 U. S. 628, 128 Atl. 918	6
Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618	7
Moore v. C. & O. R. Co., 291 U. S. 205	5
Ross v. Schooley, 257 Fed. 290 (C. C. A. Seventh), 249 U. S. 615	6
Southern Pac. Co. v. Walton, Oct. Term 1935 No. 548	5
Texas Railroad v. Rigsby, 241 U. S. 36	6
Thornton v. Duffy, 254 U. S. 361	5
Walton, Administratrix v. Southern Pacific Company, 48 Pac. (2d) 108	4, 5
Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, 256 U. S. 696	6

Codes and Statutes

Cal. Stat. 1917, p. 831, as amended by Cal. Stat. 1919, p. 912, Cal. Stat. 1923, p. 375 and Cal. Stat. 1929, p. 430	2
Judicial Code, Section 240(a)	2
27 Statutes 531, Title 196, Section 2	2

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner J. W. Tipton prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on June 24, 1935.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 78 Fed. (2d) 450 [R. 39].

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 24, 1935. Petitioner's petition for rehearing therein was denied October 21, 1935.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The pertinent statutes involved are the Federal Safety Appliance Act, Safety Appliance Act of March 2, 1893 (Title 196, Section 2, 27 Statutes 531); California Workmen's Compensation Act (Cal. Stat. 1917, p. 831, as amended by Cal. Stat. 1919, p. 912, Cal. Stat. 1923, p. 375, and Cal. Stat. 1929, p. 430). Applicable excerpts therefrom will be found in the Appendix.

QUESTION PRESENTED.

Did the Circuit Court of Appeals err in deciding—directly contra to the California courts' construction of the California Statutes—in a case removed to the United States District Court in California from a state court on the ground of diversity of citizenship—that a California railroad employee injured due to

a violation by his railroad employer of the Federal Safety Appliance Act, on a highway of interstate commerce, while both the employer and employee were engaged in *intrastate* rather than *interstate* commerce, had no right to sue for damages under applicable California statutes and that his sole remedy was to recover compensation under the provisions of the compulsory California Workmen's Compensation Act?

STATEMENT OF THE CASE.

Petitioner's complaint alleged that petitioner was injured while in the employ of the Southern Pacific Company, a corporation, on a highway of interstate commerce, by reason of a defective coupler maintained by the railroad company in violation of Section 2 of Title 197 of the Act of March 2, 1893 (Safety Appliance Act), and prayed for general damages proximately resulting from such defect.

The District Court sustained a general demurrer to the complaint without leave to amend and the Circuit Court of Appeals of the Ninth Circuit affirmed this judgment on the ground that the sole remedy of the petitioner was under the California Workmen's Compensation Act, a compulsory statute containing special provisions affecting railroad employees, and that the petitioner did not have a cause of action for general damages.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in holding that the California Workmen's Act (a compulsory act) was the sole remedy of the petitioner for a violation of the Federal Safety Appliance Act.

REASONS WHY WRIT SHOULD BE GRANTED.

I.

THE CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW, IN CONFLICT WITH APPLICABLE LOCAL CALIFORNIA STATE COURT DECISIONS.

In the case of *Ballard v. Sacramento Northern Railroad,* 126 Cal. App. 486, the District Court of Appeal of California passed on the peculiar and special provisions of the compulsory California Workmen's Compensation Act and directly held that the applicable state statute in California was NOT the California Workmen's Compensation Act, and that a railroad employee engaged upon a highway of interstate commerce, but at the time engaged in intrastate commerce, had a right of action under general California Statutes governing actions for damages, against the railroad company for damages for violation of the duty imposed under the Federal Safety Appliance Act. In a decision rendered on July 3, 1935, the District Court of Appeal of California, in the case of *Walton, Administratrix v. Southern Pacific Company,* 48 Pac. (2d) 108 (not yet officially reported) again directly held, expressly following *Ballard v. Sacramento Northern Railroad,* supra, to the same effect. Petition of the South[illegible]n Pacific Company for writ of certiorari

in the *Walton* case was denied by this court on December 9, 1935 (*Southern Pac. Co. v. Walton*, Oct. term 1935 No. 548). The foregoing cases are *directly contrary* to the holding of the Circuit Court of Appeals in the instant case.

This court has held, that the remedy in a case of this kind is solely one to be determined under applicable state law by a state court.

Gilvary v. Cuyahoga Valley Railroad, 292 U. S. 57.

This court accepts the meaning and scope given to a State Workmen's Compensation Act, by a local state court.

Thornton v. Duffy, 254 U. S. 361;
Burns Mtg. Co. v. Fried, 292 U. S. 487.

The California court in its decision in *Walton v. Southern Pacific Company*, supra, fully discussed and considered the decisions of this court in *Moore v. C. & O. R. Co.*, 291 U. S. 205 and *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57, and after such consideration and discussion followed the rule established in the case of *Ballard v. Sacramento Northern R. Co.*, supra. The California court therefore, called upon to consider *the applicable state statute*, reaffirmed and followed its former decision after a consideration of the Moore and Gilvary cases decided by this court.

In the case of *Gilvary v. Cuyahoga*, supra, the Ohio court had held that an *election* by an employee to accept the provisions of the Ohio Workmen's Compensation Act confined the employee to the Compensation Act as his sole remedy. All that this court held in

that case was that the scope and effect given the Elective Compensation Act of Ohio by the Ohio court was not repugnant to the provisions of the Safety Appliance Act and *this court therefore accepted the meaning and scope given to the Ohio Workmen's Compensation Act by the Ohio court.* It should do likewise in the instant case.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The decision below conflicts with the decision in *Ross v. Schooley,* 257 Fed. 290 (C. C. A. Seventh) certiorari denied, 249 U. S. 615 and *Director General v. Ronald,* 265 Fed. 138 (C. C. A. Second).

In *Ross v. Schooley* (and Director General v. Ronald followed the same) the court held that Congress had created the liability for damages due to violation of the Safety Appliance Act and that state legislatures cannot alter or impair that Federal Act by the passage of compulsory Compensation Acts. In so holding the Seventh Circuit following the decision of this court in *Texas Railroad v. Rigsby,* 241 U. S. 33.

The decisions in *Ross v. Schooley,* supra, and *Director General v. Ronald,* supra, find support in the following eminent authorities:

McMahon v. Montour R. Co., 270 U. S. 628, reversing 128 Atl. 918;

Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, certiorari denied, 256 U. S. 696 (*decision by Mr. Justice Cardozo then sitting in New York Court of Appeals*);

Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618;
Kenna v. Calumet H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3;
Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1;
Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847;
Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300;
Anderson v. C. & O., 252 Ill. 561, 186 N. E. 185, certiorari denied by Supreme Court, 290 U. S. 675.

CONCLUSION.

It is respectfully submitted that this petition should be granted.

Dated, San Francisco, California,
December 23, 1935.

HERMAN A. BACHRACK,
Attorney for Petitioner.

CLIFTON HILDEBRAND,
LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
Of Counsel.

(Appendix Follows.)